Supreme Court, U.S.
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132

No. 09-9

In the Supreme Court of the United States

ALTON H. MADDOX, JR.,

Petitioner,

v.

A. GAIL PRUDENTI as Presiding Justice of the APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT; DAVID S. RITTER, MYRIAM J. ALTMAN, NANCY E. SMITH, FRED T. SANTUCCI, ANITA R. FLORIO, HOWARD MILLER, STEPHEN G. CRANE, THOMAS A. ADAMS, DANIEL F. LUCIANO, GABRIEL M. KRAUSMAN, SONDRA MILLER, GLORIA GOLDSTEIN, ROBERT W. SCHMIDT, STEVEN W. FISHER, ROBERT A. SPOLZINO, WILLIAM F. MASTRO, BARRY A. COZIER, REINALDO E. RIVERA, PETER B. SKELOS; ROBERT A. LIFSON as Associate Justices of the Appellate Division, Second Judicial Department,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER race can be employed as a factor to depart from the doctrine of stare decisis involving a white doctor, on the one hand, and an outspoken Black attorney, on the other hand, and, afterwards, FRAP § 32.1 and Local Rule 0.23 are utilized to insulate the summary order from the Reporter of Decisions.

WHETHER the clerk of the court or the chief judge has the authority to engage in judge shopping to prevent a party from successfully asserting any constitutional claims in the district court and disallowing the claims to be subject to appellate review.

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Alton H. Maddox, J., respectfully petitions for a writ of certiorari to review the summary order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the Court of Appeals (App., infra 1a) reported at 303 Fed. Appx. 962 (2nd Cir. 2008). The opinions of the district court are unreported. (App., infra 8a and 12a)

JURISDICTION

The Court of Appeals entered its summary order on December 23, 2008 (App., infra 1a). The court of appeals denied a timely petition for rehearing on January 26, 2009 (App., infra 36a).

CONSTITIONAL & STATUTORY PROVISIONS INVOLVED

Art. 1, sec. 10 cl. 1:

No State .... pass any Bill of Attainder, ex post facto Law....

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V
No person shall ....be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIII
1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment XIV
1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fed R App P § 32.1
A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as 'unpublished' 'not for publication' 'non-precedential,' 'not precedent,' or the like; and

(ii) issued on or after January 1, 2007

Second Circuit Local Rule
§ 0.23.

(a) The demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion.

(b) Rulings by summary order do not have precedential effect.

Citation of Summary Orders

(1) Citation to summary order filed after January 1, 2007, is permitted.

(A) In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)."

(B) Unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/), the party citing the summary order must file and serve a copy of that summary order together with the paper in which the summary order is cited. If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

(2) Citation to summary orders filed prior to January 1, 2007, is not permitted in this or any other court, except in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata.

(d) Summary orders filed after January 1, 2007, shall bear the following legend:

SUMMARY ORDER

Rulings by summary order to not have precedential effect. Citation to summary orders filed after January 1, 2007, is permitted and is governed by this court's Local Rule 0.23 and Federal Rule of Appellate Procedure 32.1. In a brief or other paper in which a litigant cites a summary order, in each paragraph in which a citation appears, at least one citation must either be to the Federal Appendix or be accompanied by the notation: "(summary order)." Unless the summary order is available in an electronic database which is publicly accessible without payment of fee (such as the database available at http://www.ca2.uscourts.gov/), the party citing the summary order must file and serve a copy of that summary order together with the paper in which the summary order is cited. If no copy is served by reason of the availability of the order on such a database, the citation must include reference to that database and the docket number of the case in which the order was entered.

22 NYCRR§50.2

The clerk shall assign a civil case upon the filing of the initial pleading.

All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk's offices in such a manner that each active judge shall receive as nearly as possible the same number of cases, except as provided in paragraph (h). Where a party or his counsel requests prior to selection that he or she be present at the selection, the clerk shall make reasonable efforts to comply with the request. In Brooklyn civil cases a magistrate judge shall be drawn at the same time and in the same manner as a judge. All Long Island civil cases shall be assigned to the Long Island magistrate judge.

STATEMENT

Petitioner was indefinitely suspended from the practice of law in New York after members of the New York Legislature initiated a disciplinary complaint against him for his representation of unpopular defendants and causes. Subsequently, petitioner was definitely suspended from the practice of law in New York for five years.

In a petition dated July 21, 2003, petitioner moved the respondents for an order allowing for his reinstatement to the practice of law based on newly-discovered evidence. Respondents denied this application because it was outside the scope of 22 NYCRR §691.11. Stated differently, newly-discovered evidence is unavailable as a ground to vacate and set aside a disciplinary order of suspension in New York.

On or about December 15, 2004, petitioner initiated a civil rights action in the United States District Court for the Eastern District of New York against the respondents. Jurisdiction was invoked under 42 USC

§§ 1331 and 1343. The complaint was modeled after Hachamovitch v. DeBuono, 159 F.3d 687 (2nd Cir. 1998)(Jacobs, J.) which allowed a white medical doctor to reopen a closed medical disciplinary proceeding based on newly-discovered evidence.

This action was originally assigned to Judge Carol B. Amon without complying with the random assignment procedure of Loc. R. 50.2(b) in the Eastern District. After petitioner filed an objection, Judge Nina Gershon was randomly assigned to the case. A "Notice to Parties" dated October 27, 2006 and from Chambers of Judge Nina Gershon stated: "This letter is to advise you that Judge Nina Gershon has recused herself from this case and Judge Brian M. Cogan has been assigned in her stead." No reason was ever given for the recusal. No mention was made of a random assignment.

The assignment to Judge Cogan was also made in excess of Local Rule 50.2. Upon Petitioner's objection to the illegal assignment of Judge Cogan, Judge Allyne R. Ross was surreptitiously selected and without petitioner's presence nor his knowledge as is required by Local Rule 50.2. Petitioner became aware of this assignment after Judge Ross summarily disposed of the motion to dismiss under Rule 12(b)(6) of the FRCP in defendants' favor.

In a letter dated November 8, 2005 from the attorney for respondents to Judge Gershon, the letter reads in part as follows:

> Similarly his objection as set forth in the same paragraph to defendants' use of the word

'disbarment' to describe his status. 'Disbarment' is defined as follows:

> The action of expelling a lawyer from the bar or from the practice of law, usu. because of some disciplinary violation .... Although disbarment is typically a permanent removal from the practice of, in some jurisdictions a disbarred may (after a certain period) petition for readmission

This letter from the attorney for the respondents prompted this response, in part, in a letter dated March 8, 2006 from petitioner to Judge Gershon:

> Defendants are seeking to change my legal status from suspended attorney to disbarred attorney as it represented in its initial letter to this Court dated June 16, 2005. This unwarranted reclassification would negatively affect the standard for my reinstatement to the practice of law absent the constitutional violations.

Judge Gershon nor any subsequent judge of the District Court ever entertained the claim of petitioner's unconstitutional disbarment. The federal civil rights complaint was premised on petitioner being a suspended attorney. Respondents had never formally nor informally claimed that petitioner had been disbarred and no formal claim of disbarment had ever been lodged against petitioner even though disbarment in New York is only seven years. The District Court failed to question respondents about

petitioner's legal status while insulating respondents from any bad-faith litigation.

The District Court allowed petitioner twenty days to re-plead his First Amendment claim of retaliation "[b]ecause this admonition occurred after plaintiff served his amended and supplemental complaint on May 1, 2006, the complaint obviously omits it."

The admonition arose on June 29, 2006. Judge Ross was unaware that petitioner had requested a hearing pursuant to 22 NYCRR §691.6 and no hearing occurred until July 2007 and after the appeal had been perfected. The Brooklyn Grievance Committee sustained the disciplinary complaint even though the criminal court had inexplicably destroyed the court file and the complaining judge had no memory of the event.

Chief Judge Jacobs of the Second Circuit was also a member of the panel that decided the instant appeal in Maddox v. Prudenti et. al. With respect to an absence of a mechanism to present newly-discovered evidence in a disciplinary proceeding, the Second Circuit ruled on petitioner's claim of due process as follows:

> In fact, the Second Department does have such a mechanism: N.Y.C.P.L.R. 5015(a)(2) allows a court to relieve a party from judgment 'upon the ground of ... newly-discovered evidence which, if introduced at trial, would probably have produced a different result and which could not have been discovered on time to move for a new trial' See also C.P.L.R. 103(b) (applying C.P.L.R. 5015(a)(2) to disciplinary proceedings.) And

because a procedure for the submission of new evidence exists –a procedure that Maddox has not as yet invoked –Maddox cannot allege an injury. The dismissal of the first claim must therefore be affirmed.

I. RACE AFFECTS DOCTRINE OF STARE DECISIS IN COURT OF APPEALS

While the doctrine of stare decisis is not an inflexible rule, it is well-settled that this Court will not "depart from the doctrine of stare decisis without some compelling justifications." Hilton v. South Carolina Public Railway Comm'n. 502 U.S. 197, 203 112 S.Ct. 560, 116 L.Ed 2d 560 (1991). Strict scrutiny must be invoked to analyze any purported justification. See Korematsu v. United States 323 U.S. 214 (1944) and Loving v. Virginia, 388 U.S. 1(1967).

The Fourteenth Amendment, which was supposed to invalidate Scott v. Sandford, 19 How. (60 U.S.) 393 (1857), did not take reasonable effect in American jurisprudence until Brown v. Board of Education, 347 U.S. 483 (1954). In the meantime, this Court had held in Plessy v. Ferguson, 163 U.S. 537 (1896) that the separation of the races in public accommodations was constitutionally permissible.

This delay in giving judicial deference to the Fourteenth Amendment spawned myriad cases before the Court. See e.g., Missouri ex. rel. Gaines v. Canada, 305 U.S. 337 (1938); Smith v. Allwright, 321 U.S. 649 (1944); Morgan v. Virginia, 328 U.S. 373 (1946); Shelley v. Kramer, 334 U.S. 1 (1948) Cummings v. Richmond Co. Bd. of Ed., 175 U.S. 528 (1899); and Moore v, Dempsey, 261 U.S. 86 (1923).

It may have been judicially economical and efficient to this Court for racial segregation to have been practiced beyond 1868 but it undermined and stained this country's judicial system and made a mockery out of democracy.

In this vein, the employment of Rule 32.1 of the Fed. R. App.P, which gives the Second Circuit unbridled judicial discretion to publish or not to publish an opinion, undermines the doctrine of stare decisis and lends itself to judicial bias.

Although Rule 32.1 of the Fed. R. App.P may be construed as passive on the use of citations of judicial opinions, Local Rule § 0.23 of the Second Circuit makes it clear that "[r]ulings by summary order do not have precedential effect." This is a backdoor approach to reviving the local rules of circuit courts and stifling the doctrine of stare decisis. The Second Circuit arbitrarily substitutes precedential value with persuasive value and its local rules conflicts with the local rules of other circuits.

For example, Local Rule 36 of the First Circuit states that when an opinion has been drafted, it is preferred that it be published except" where opinions are likely not break new legal ground or contribute otherwise to legal development...." Under this criteria, the opinion herein would have been published as a departure from controlling precedent. Secrecy masks this departure.

The Second Circuit disposed of petitioner's first claim that the Second Department's lack of a mechanism by which attorneys can submit newly discovered evidence to challenge their suspension from

the practice of law violated states' rights by ruling that C.P.L.R. 103(b) applies C.P.L.R. 5015(a)(2) to disciplinary proceedings. This ruling violated the rationale for the Rooker-Feldman doctrine.

Interestingly, the Second Circuit failed to cite any case to support this supposition. Moreover, this was not the approach followed by Hachamovitch v. DeBuono, 159 F.3d 687 (2nd Cir. 1998) which held that Rooker-Feldman doctrine did not bar the Second Circuit Court of Appeals from assuming jurisdiction over a due process claim concerning the lack of a mechanism in the state for reopening a closed medical disciplinary proceeding.

Chief Judge Jacobs authored the opinions in both Hachamovitch v. DeBuono and Maddox v. Prudenti et. al. The former case involved a white doctor. The latter case involved a Black lawyer. This was the only viable distinction in both cases.

Both cases arose under New York law and they both involved an absence of a judicial mechanism to present a claim of newly-discovered evidence in a disciplinary proceeding. Yet, Chief Judge Jacobs failed to direct Dr. Moshe Hachamovitch to initiate a disciplinary proceeding under C.P.L.R. 5015(a)(2) as the Court did with petitioner.

No court in New York has ever ruled that CPLR §§ 103 and 5015 (a)(2) are available to doctors or lawyers in disciplinary proceedings. In a case of first impression, the Second Circuit Court of Appeals ruled that these statutory provisos were available to attorneys but that doctors, similarly situated, had federal civil rights claims.

This judicial split in authority in the Second Circuit Court of Appeals does serious harm to the doctrine of stare decisis and it violates the "well –established [rule] in this Circuit that 'one panel of this Court cannot overrule a prior decision of another panel, unless there has been an intervening Supreme Court decision that cast doubt on [this Court's] controlling precedent." [citations omitted]. Consub Delaware LLC v. Scharin Engenharia Limitada, 543 F.3d 104, 107 (2nd Cir. 2009).

To be sure, petitioner violated no disciplinary rule by refusing to cooperate with the state against his client amid a criminal trial. Initially, the Brooklyn Grievance Committee admitted that any investigation of the disciplinary complaint would be burdened by the attorney-client privilege. For not cooperating with the state against his client and refusing to violate the attorney-client privilege, petitioner was cruelly, wrongfully, and excessively disciplined.

Moreover, an affidavit was secured from a grand juror noting that the state attorney general had serious departed from the law in conducting the grand jury investigation; namely, Article 190 of the Criminal Procedure Law. The state attorney general and not the grand jury had authored the grand jury report which became the basis for the disciplinary investigation.

New York courts have already ruled that any serious departure from the grand jury investigation mandates a suppression of the grand jury minutes which, allegedly, supported the grand jury investigation. This information became available only

fourteen years after the end of the grand jury investigation and after petitioner's "disbarment."

While this court has now ruled on the merits in Osborne v. District Attorney's Office for the Third Judicial District et. al., 521 F.3d 1118 (9th Cir. 2008) revd. 557 U.S. ____ (2009) it is interesting to note that a review of its due process claim was not saddled down by the Rooker-Feldman doctrine.

Alaska lacks a statute giving a convicted defendant access to biological evidence which was used to convict him. Petitioner, on the other hand, is seeking access to secret but exculpatory, grand jury minutes and a forum to adjudicate his claims. The Second Circuit Court of Appeals fails to appreciate this distinction under Rooker-Feldman.

The Court below clearly misunderstood the efficacy of the Rooker-Feldman doctrine which applies to matters which precede rather than matters which follow a state court judgment. See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005).

But district courts have jurisdiction to review "general challenges to state bar admission rules" since state "courts may act in a non-judicial capacity in promulgating rules regulating the bar." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

The Second Circuit Court of Appeals also failed to appreciate petitioner's claim that respondents had a duty to explain its decision since petitioner was indefinitely suspended from the practice of law in 1990 without due process; definitely suspended in 1994 with

at least a semblance of due process; and arguably disbarred from the practice of law in 2006 without any pretense of adhering to due process.

Thus, it was error for the Court of Appeals to assert that petitioner suffered no injury because of the Second Department's failure to explain its refusal to reinstate him. This may have been correct if this Court had not already ruled in In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968) that an attorney is entitled to due process before a state can disbar him or her.

Aside from the procedural requirements of due process, an attorney is at least entitled to know his or her legal status. There is a difference between being a suspended attorney and being a disbarred attorney. A disbarred attorney in New York is subject to the whims of respondents. On the other hand, a suspended attorney must simply satisfy the conditions in the suspension order.

The Ex Post Facto claim under Art. 1, §10, cl. 3 is viable because when petitioner sought reinstatement to resume the practice of law, respondents imposed new conditions on petitioner which emulated the conditions for a disbarred attorney without informing him that respondents were treating him as a disbarred attorney.

These conditions certainly satisfy the test raised in City of Los Angeles v. Lyons 461 U.S.95 (1983) in which this Court said "[petitioner] must demonstrate that he faces a concrete and particularized, non-speculative, imminent future harm." The threat at the very least of disbarring an already suspended attorney certainly falls within "concrete and particularized,

non-speculative, imminent future harm. Id. At 102-103.

II. JUDGE SHOPPING IS FROWNED UPON IN THE FEDERAL COURTS

Local Rule 50.2 of the Eastern District of New York clearly provides for the random selection of judges. Citing Rules of the United States District Court for the Eastern District of New York, Rule 50.2(b), the random selection of judges must be in public view and in the clerk's office. See United States v. Phillips, 59 F.Supp. 2d 1178, 1180 (D. Utah. 1999).

Although this rule is simple, four judges were separately assigned in the District Court below. Only one judge was randomly assigned and she recused herself after more than one year as the assigned judge without citing a reason as is required under 28 U.S.C. § 455. The only inference to be drawn is that she belatedly developed a judicial bias against petitioner.

While petitioner was awaiting a response from his objection to the calculated assignment of Judge Cogan who was a former law partner to the special prosecutor who had investigated the disciplinary complaint against petitioner, Judge Ross was surreptitiously assigned to hear the case.

It is well-settled that neither the chief judge nor the clerk of the court has the authority to make any changes to the Court's rule allowing for random assignment of cases nor to withdraw any assignment and reassign the case to another judge. United States v. Phillips at 1182-1184. The rule allowing for random

assignment of cases was ignored to petitioner's detriment.

Petitioner was entitled to access to the courts. This means that petitioner was entitled to present his claims to an unbiased, judicial, fact-finder. Judge Ross, who decided the motion to dismiss, never met petitioner and never read the file intelligently enough to understand the factual and constitutional claims.

Petitioner had already raised the claim of his possible disbarment based on representations from counsel for respondents. No action had been taken on it. Moreover, Judge Ross failed to appreciate the status of petitioner's First Amendment claim and the New York Court Rules and Regulations.

Judge Ross ordered petitioner to replead his First Amendment claim although the New York Court Rules and Regulations allowed petitioner to exhaust his claims administratively. Thus, the order of Judge Ross was premature. When petitioner was unable to intelligently replead his claim, Judge Ross dismissed it. This was error.

The concerns in this case about the tension between 28 U.S.C. § 455 and the rules for random assignment of judges was concisely discussed in In re Bell South Corp., 334 F.3d 941, 956 n.7 (11th Cir. 2003). There are few decisions on the issue.

When Judge Gershon was allowed to recuse herself without giving a reason and the subsequent, secret assignment of a judge who was a law partner of the special prosecutor had the effect of setting this case on a disaster course. When this relationship was

revealed, Judge Ross was secretly assigned to the case and she hurriedly disposed of it in violation not only of the random assignment rule but also, in violation of due process.

CONCLUSION

Stare decisis is the bedrock of American jurisprudence. It not only requires an adherence to prior precedent but it also provides for certainty of result. There was also not only a marked departure from prior precedent including the Rooker-Feldman doctrine but also Fed R.App. P §32.1 and Local Rule §0.23 of the Second Circuit which replaces precedential value with persuasive value.

When the clerk of the district court or its chief judge was allowed to skirt a random assignment rule, it denied to petitioner the right to present constitutional claims to an unbiased fact-finder. The constitutional claims include the right not to be disbarred without due process of law and the right of a disbarred lawyer to be free of judicial retaliation for exercising First Amendment rights and representing unpopular defendants and causes.

When petitioner initiated this civil rights action, petitioner had no notice or proof that his status had been changed from a suspended attorney to a disbarred attorney. Counsel for respondents admitted, in writing, that petitioner had been disbarred during the course of this litigation. Petitioner attempted to bring this matter to the attention of the District Court without success. Due process concerns and claims of retaliation for exercising First Amendment rights were of no moment to the District Court.

Accordingly, the court should grant the petition for a writ of certiorari.

Dated: Brooklyn, NY
June 26, 2009

Respectfully submitted,

Alton H. Maddox, Jr.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

07-0187-cv

[Filed December 23, 2008]

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF

THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of December, two thousand eight.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. REENA RAGGI,
Circuit Judge,
HON. DEBRA ANN LIVINGSTON,
Circuit Judge.

ALTON H. MADDOX Jr.,
PLAINTIFF-APPELLANT,
v.

A. GAIL PRUDENTI, DAVID S. RITTER, MYRIAM J. ALTMAN, NANCY E. SMITH, FRED T. SANTUCCI, ANITA R. FLORIA, HOWARD MILLER, STEPHEN G. CRANE, THOMAS A. ADAMS, DANIEL F. LUCIANO, GABRIELA M. KRAUSMAN, SONDRA MILLER, GLORIA GOLDSTEIN, ROBERT W. SCHMIDT, STEVEN W. FISHER, ROBERT A. SPOLZINO, WILLIAM F. MASTRO, BARRY COZIER, PETER B. SKELOS, ROBERT A. LIFSON, as Associate Justices of the Appellate Division, Second Judicial Department,
DEFENDANTS-APPELLEES.

APPEARING FOR PLAINTIFF-APPELLANT:
ALTON H. MADDOX, pro se,
New York, New York.

APPEARING FOR DEFENDANT-APPELLEES:

PATRICK J. WALSH, Esq.,
Assistant Solicitor General, for Andrew M. Cuomo,
Attorney General of the State of New York.

Appeal from an order of the United States District Court for the Eastern District of New York (Ross, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the District Court's order be **AFFIRMED**.

Alton Maddox appeals from a judgment of the United States District Court for the Eastern District of New York (Ross, J.) dismissing his facial and as-applied constitutional challenges to the attorney reinstatement procedures of the Supreme Court of the State of New York Appellate Division, Second Judicial Department. The District Court dismissed Maddox's facial claims for lack of standing and his as-applied claims under the Rooker-Feldman doctrine. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

Maddox first claims that the Second Department's lack of a mechanism by which attorneys can submit newly discovered evidence to challenge their suspension from practice violated the Fourteenth Amendment. In fact, the Second Department does have such a mechanism: N.Y. C.P.L.R. 5015(a)(2) allows a court to relieve a party from judgment "upon

the ground of . . . newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial." See also C.P.L.R. 103(b) (applying C.P.L.R. 5015(a)(2) to disciplinary proceedings). And because a procedure for the submission of new evidence exists--a procedure that Maddox has not as yet invoked-Maddox cannot allege an injury. The dismissal of the first claim must therefore be affirmed.

Second, Maddox claims that the Second Department unconstitutionally failed to explain its decision to deny his application for reinstatement. Under the Rooker-Feldman doctrine, "federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments." Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 84 (2d Cir. 2005). The Rooker-Feldman doctrine precludes our review of state court decisions when all four of the following conditions exist:

> First, the federal-court plaintiff must have lost in state court. Second, the plaintiff must "complain[] of injuries caused by [a] state-court judgment[.]" Third, the plaintiff must "invit[e] district court review and rejection of [that] judgment[]." Fourth, the state-court judgment must have been "rendered before the district court proceedings commenced"--i.e., Rooker-Feldman has no application to federal-court suits proceeding in parallel with ongoing state-court litigation.

Holbock, 422 F.3d at 85 (alterations in original) (footnote omitted) (quoting Exxon-Mobil Corp. v. Saudi

Basic Indus. Corp., 544 U.S. 280, 284 (2005)). The Rooker-Feldman doctrine applies here to preclude our review of Maddox's second claim: Maddox lost in state court; that happened in 2003, prior to the filing of this federal lawsuit; he complains of an injury caused by a state court judgment-namely the Second Department's failure to explain its refusal to reinstate him; and his claim is clearly designed to assist him in review and reversal of that judgment. It follows that we lack jurisdiction over this claim, and its dismissal must accordingly be affirmed.

Third, Maddox claims that the Second Department violated the Ex Post Facto clause, U.S. Const. Art. I § 9 cl. 3, by imposing new conditions on his reinstatement that were not in the original order suspending him from the practice of law. However, "[t]he ex post facto clause forbids retroactive application of penal legislation, not civil legislation." Domond v. I.N.S., 244 F.3d 81, 87 (2d Cir. 2001). This claim also meets the four Rooker-Feldman requirements: it arises from a suit Maddox lost in state court, prior to the filing of this lawsuit; it complains of an injury caused by a state court judgment; and it seeks review and reversal of that judgment. Its dismissal must therefore be affirmed.

Fourth, Maddox claims that the absence of rules in the Second Department relating to compulsory process and discovery rights for disciplined attorneys violated the Fourteenth Amendment. Insofar as Maddox challenges his own past proceedings before the state courts, we lack jurisdiction under the Rooker-Feldman doctrine for the same reasons already given. And insofar as Maddox challenges the constitutionality of future proceedings, his claim has been mooted by the

Second Department's adoption, in 2005, of 22 N.Y. Comp. Codes R. & Regs. Tit. 22, § 691.5-a, which provides that in a "formal disciplinary proceeding" against an attorney, the clerk of court may issue subpoenas, and the testimony of unavailable witnesses may be taken by deposition.

Fifth, Maddox claims that the Second Department discriminated against him on the basis of race. Maddox's claim of discrimination in past proceedings must be dismissed on Rooker-Feldman grounds: Maddox lost in those proceedings, which predated this lawsuit; he complains of an injury caused by the state court's judgment; and he seeks review and reversal of that judgment. With regard to Maddox's claim of possible future discrimination, Maddox lacks standing: such a claim would require him to show that if he applied for admission or reinstatement in the Second Department, his application would then be rejected based on racial animus. This is too speculative an allegation to support standing. See Allen v. Wright, 468 U.S. 737, 751 (1984) (abstract, conjectural, or hypothetical injuries cannot support standing).

Finally, Maddox claims that, in violation of the First Amendment, the Second Department retaliated against him for publishing certain opinion pieces in the New York Amsterdam News. Maddox represents that the Second Department's Grievance Committee scheduled a disciplinary hearing for July 19, 2007, but the record on appeal does not reflect whether the Grievance Committee has reached a final resolution of the matter. Until it does, Maddox's First Amendment claim would not be ripe; moreover, we would lack jurisdiction over Maddox's claim even if it were ripe, since it is barred by the Rooker-Feldman doctrine.

Accordingly, we hereby **AFFIRM** the judgment of the District Court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK
By: Richard Alcantara, Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

04 CV 5444 (ARR)(LB)

[Dated January 16, 2007]
[Filed January 18, 2007]

ALTON H. MADDOX Jr.,
PLAINTIFF,
v.

A. GAIL PRUDENTI, as Presiding Justice of the APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT; DAVID S. RITTER, MYRIAM J. ALTMAN, NANCY E. SMITH, FRED T. SANTUCCI, ANITA R. FLORIO, HOWARD MILLER, STEPHEN G. CRANE, THOMAS A. ADAMS, DANIEL F. LUCIANO, GABRIEL M. KRAUSMAN, SONDRA MILLER, GLORIA GOLDSTEIN, ROBERT W. SCHMIDT, STEVEN W. FISHER, ROBERT A. SPOLZINO, WILLIAM F. MASTRO, BARRY A. COZIER, REINALDO E. RIVERA, PETER B. SKELOS, ROBERT A. LIFSON, as Associate Justices of the Appellate Division, Second Judicial Department,
DEFENDANTS.

ROSS, United States District Judge:

By Opinion and Order dated December 14, 2006, this court dismissed several of the plaintiffs claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and granted the plaintiff permission to re-plead his First Amendment retaliation claim within twenty days of the date of the order,

More specifically, the court held that under the Rooker-Feldman doctrine it lacked subject matter jurisdiction to entertain plaintiffs challenges to the particular application of the disciplinary rules in the state judicial proceedings against him. The court further held that it lacked subject matter jurisdiction to entertain plaintiff's facial challenges to the disciplinary rules and procedures because plaintiff lacked standing to bring such challenges. For these reasons, the court dismissed causes of action one through five pursuant to Fed. R. Civ. P. 12(b)(1).

With respect to the plaintiff's First Amendment retaliation claim, the court noted that the amended complaint omitted the admonition subsequently issued by the Grievance Committee and so the court granted plaintiff permission to re-plead his First Amendment claim within twenty days, directing plaintiff to set forth, if possible, the elements of a First Amendment retaliation claim required by Second Circuit precedents regarding criticism of public officials by private citizens. See, e.g., Gill v. Pidlypchak, 389 F.3d 379 (2d Cir. 2004). The plaintiff has heretofore failed to re-plead this claim. Nor has plaintiff requested an adjournment. Pursuant to Fed. R. Civ. P. 12(b)(6), the court therefore dismisses plaintiffs First Amendment retaliation claim, his sixth cause of action, for failure to state a claim upon which relief can be granted.

The Clerk of Court is instructed to enter judgment accordingly.

SO ORDERED.

/s/_____
Allyne R. Ross
United States District Judge

Dated: January 16, 2007
Brooklyn, New York

SERVICE LIST:

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cc: Magistrate Judge Bloom

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

04 CV 5444 (ARR)(LB)

[Dated December 14, 2006]
[Filed December 19, 2006]

ALTON H. MADDOX JR.,
Plaintiff,
v.

A. GAIL PRUDENTI, as Presiding Justice of the APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT; DAVID S. RITTER, MYRIAM J. ALTMAN, NANCY E. SMITH, FRED T. SANTUCCI, ANITA R. FLORIO, HOWARD MILLER, STEPHEN G. CRANE, THOMAS A. ADAMS, DANIEL F. LUCIANO, GABRIEL M. KRAUSMAN, SONDRA MILLER, GLORIA GOLDSTEIN, ROBERT W. SCHMIDT, STEVEN W. FISHER, ROBERT A. SPOLZINO, WILLIAM F. MASTRO, BARRY A. COZIER, REINALDO E. RIVERA, PETER B. SKELOS, ROBERT A. LIFSON, as Associate Justices of the Appellate Division, Second Judicial Department,
Defendants.

OPINION AND ORDER

ROSS, United States District Judge:

Plaintiff pro se Alton H. Maddox, Jr., commenced the instant action with the filing of a complaint on December 15, 2004. In his Amended and Supplemental Complaint ("Compl."), served on defendants on May 1, 2006, plaintiff names as defendants several justices of the Appellate Division of the New York State Supreme Court for the Second Judicial Department[1] and seeks declaratory and injunctive relief. Now pending before the court is defendants' motion to dismiss. For the reasons set forth below, the court grants defendants' motion in part, denies defendants' motion in part, and grants plaintiff permission to re-plead his First Amendment retaliation claim within twenty days of the date of this order.

BACKGROUND

The following factual allegations are drawn from plaintiff's complaint. For the purposes of a motion to dismiss, all facts alleged in the complaint are presumed to be true.

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[1] According to the Second Department's website, several of the defendants are no longer justices of the Appellate Division. Myriam J. Altman died on January 29, 2005. Nancy E. Smith was "[d]esignated an Associate Justice of the Appellate Division, Fourth Department, effective November 23, 2004." Barry A. Cozier "[r]esigned effective January 27, 2006, to resume the active practice of law." (See http://www.courts.state.ny.us/courts/ad2/justices.shtml.)

Plaintiff was admitted to practice law in the State of New York on March 15, 1976. (Compl. ¶ 8.) In October 1988, then Attorney General Robert Abrams filed a complaint with the Grievance Committee for the Second and Eleventh Judicial Districts alleging that plaintiff had "engaged in serious professional misconduct in connection with the highly publicized Tawana Brawley matter and his representation of Ms. Brawley with respect thereto." In re Alton H. Maddox, 157 A.D.2d 244, 245 (App. Div. 2d Dep't 1990) (per curiam). (See Compl. ¶ 12.) Plaintiff refused to cooperate with the Grievance Committee's investigation. (Compl. ¶ 12; Maddox v. Mollen, No. 89 Civ. 4181, 1990WL 39869, at *2 (E.D.N.Y. Mar. 28, 1990).) On May 21, 1990, the Appellate Division, Second Department, (hereinafter the "Appellate Division"), suspended plaintiff from the practice of law until further order of the court, but permitted plaintiff to complete his representation of Alfred C. Sharpton, then a defendant in a pending criminal trial. 157 A.D.2d at 250. The New York Court of Appeals denied plaintiff's motion for leave to appeal this suspension order. 76 N.Y.2d 705 (1990). By order dated December 27, 1990, the United States District Court for the Eastern District of New York suspended plaintiff from the practice of law in this court during the period of his suspension by the Appellate Division. (Pl. Aff. Ex. A-1.)

On August 1, 1994, the Appellate Division confirmed the Special Referee's report sustaining two allegations of professional misconduct against plaintiff. 201 A.D.2d 24 (App. Div. 2d Dep't 1994) (per curiam). The specific charges sustained against plaintiff were: (1) violating the Code of Professional Responsibility DR 1-102(A)(5) and (8) (former (7)) (22

N.Y.C.R.R. § 1200.3 [a][5], [8]), for refusing to appear before the Grievance Committee and refusing to cooperate with its investigation; and (2) violating those same provisions by failing to file with the Clerk of the court an affidavit showing compliance with the court's 1990 suspension order and the Rules of the court. 201 A.D.2d at 25-26. As a result of these violations, the Appellate Division suspended plaintiff from the practice of law for a period of five years "and continuing until the further order of this Court, with leave to the respondent to apply for reinstatement . . . ." 201 A.D.2d at 29-30. On October 12, 1994, the Appellate Division denied plaintiff's motion for reargument of the order of suspension. (See Decision & Order on Motion, Nov. 25, 2003, Pl. Aff. Ex. E.) On December 1, 1994, the New York Court of Appeals denied plaintiff's motion for leave to appeal. 84 N.Y.2d 948 (1994).

On July 21, 2003, plaintiff petitioned the Appellate Division for an order "allowing for the immediate, automatic and unconditional reinstatement of Alton H. Maddox, Jr., a suspended attorney to the practice of law based on newly-discovered evidence, fraud, prosecutorial misconduct and misrepresentation." (Compl. ¶ 28.) Plaintiff's basis for this petition seems to have been a September 11, 2000, affidavit from a member of the grand jury empanelled to investigate the charges made by Ms. Brawley. (See Pl. Aff. ¶ 5; Pl. Aff. Ex. C.) The grand juror states that the grand jury's report was not authored by members of the grand jury and that dissenting grand jurors were not informed of any right to fashion a dissent to the grand jury report. (Pl. Aft. Ex. C.) According to plaintiff, the Grievance Committee responded to his petition on August 18, 2003. (Pl. Opp'n Mem. 7.) The excerpts of

the Grievance Committee's opposition quoted in plaintiff's brief to this court indicate that the Committee argued that plaintiff's petition was not properly made pursuant to 22 N.Y.C.R.R. § 691.11, which sets forth the Appellate Division's special rules for reinstatement following suspension. The excerpts indicate that the Committee further argued that if the Appellate Division opted to entertain plaintiff's "motion in its present form, the Court should note that a review of the files of the Grievance Committee. . . reveals no complaints against respondent since his suspension which have resulted in a finding of professional misconduct." (Pl. Opp'n Mem. 7.)

By Decision and Order dated November 25, 2003, the Appellate Division, "[u]pon the papers filed in support of the motion and the papers filed in response thereto," denied plaintiff's motion. (Pl. Aff. Ex. E.)

In January and February 2006, plaintiff wrote opinion columns in the New York Amsterdam News "stating that Judge William Erlbaum had given jury instructions in People v. Maddox to the effect that plaintiff was guilty of obstructing governmental administration." (Compl. ¶ 49-50.) Judge Erlbaum, according to plaintiff, had presided over the 1985 prosecution of plaintiff for obstructing governmental administration. (Pl. Opp'n Mem. 10.) Plaintiff states that he had unsuccessfully objected to Judge Erlbaum's jury instruction. Nevertheless, the jury acquitted plaintiff on all counts. (Pl. Opp'n Mem. 10.) In response to plaintiff's opinion columns, defendants "initiated a sua sponte investigation" informing plaintiff by letters dated February 7 and 22, 2006, and demanding "that plaintiff produce evidence including a jury charge to prove the claims expressed in the

articles"[2] and informing plaintiff that his failure to cooperate with the investigation "would constitute an independent ground of professional misconduct" and therefore a basis to discipline plaintiff. (Compl. ¶ 51-52; Pl. Opp'n Mem. 10-11.) Plaintiff states that he "provided two lengthy responses," which "the Grievance Committee arbitrarily found . . . unsatisfactory." (Pl. Opp'n Mem. 11 .) Plaintiff states that by letter "dated June 29, 2006, the Grievance Committee informed plaintiff that it had issued an admonition" and "that any further professional misconduct may negatively affect plaintiff's current legal status." (Pl. Opp'n Mem. 11 .) "An admonition is discipline imposed without a hearing." 22 N.Y.C.R.R. § 691.6.

On December 15, 2004, plaintiff commenced the instant lawsuit in this court, seeking declaratory and injunctive relief. Plaintiff now seeks declaratory and injunctive relief on the grounds that (1) defendants' failure to fashion procedures for post-disciplinary relief based on newly discovered evidence, fraud, prosecutorial misconduct and misrepresentation, such as New York law provides civil litigants, see N.Y. C.P.L.R. § 5015, and criminal defendants, see N.Y. Crim. Proc. Law § 440.10, violates the Due Process and Equal Protection Clauses of the Fourteenth

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[2] The defendants dispute that the letters demanded that plaintiff produce evidence to prove the claims expressed in his articles. The defendants contend that the February 7, 2006, letter stated: "Along with your answer please feel free to submit any material you deem relevant or helpful, such as a transcript of the jury charge in question." (Def. Mem. 8 n.2.) Neither party has submitted to this court any of the letters concerning the investigation and admonition of plaintiff in 2006.

Amendment; (2) defendants' failure to give reasons for rejecting plaintiff's application for reinstatement to practice law violates the Due Process Clause; (3) defendants set conditions upon plaintiff's reinstatement in violation of the Due Process and Equal Protection Clauses and the Ex Post Facto Clause; (4) defendants' failure to fashion procedures for compulsory process and discovery to assist attorneys in disciplinary proceedings, such as those the First Judicial Department provides, see 22 N.Y.C.R.R. § 605.17, violates the Due Process and Equal Protection Clauses; (5) defendants have subjected "attorneys of African ancestry to terms, conditions, standards and practices to be reinstated to law different from those terms, conditions, customs, usages, standards and procedures employed under Judiciary Law § 90 and 22 N.Y.C.R.R. § 691.11 to Caucasian attorneys"; and (6) defendants' investigation in response to plaintiff's newspaper columns constitutes retaliation in violation of the First Amendment.

Defendants move to dismiss on the basis of the Rooker-Feldman doctrine, res judicata, failure to state a claim under § 1983, the statute of limitations, and ripeness. (Def. Mem. 2.)

DISCUSSION

A. MOTION TO DISMISS STANDARD

1) Rule 12(b)(1)

When considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may consider affidavits and other materials

beyond the pleadings. See Robinson v. Gov't of Malaysia, 269 F.3d 133, 140-41 & n.6 (2d Cir. 2001). Under Rule 12(b)(1), the court must accept as true all material factual allegations in the complaint, but will not draw inferences favorable to the party asserting jurisdiction. Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998). However, the court notes "that the obligation to read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments that they suggest extends to the question of standing no less than it does to any other issue." Lerman v. Board of Elections, 232 F.3d 135, 142 n.8 (2d Cir. 2000) (internal quotations and citation omitted). As the party seeking to invoke the jurisdiction of the court, the plaintiff bears the burden of demonstrating that subject matter jurisdiction is proper based on facts existing at the time the complaint was filed. Scelsa v. City Univ. of N.Y., 76 F.3d 37, 40 (2d Cir. 1996). "While a plaintiff's standing is ordinarily assessed as of the time a lawsuit is brought, immediate post-filing events may be taken into account where . . . the relief requested is directed at preventing a future action . . . ." Hakim v. Chertoff, 447 F. Supp. 2d 325, 328 (S.D.N.Y. 2006).

2) Rule 12(b)(6)

On a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the court should dismiss the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his complaint which would entitle him to relief." King v. Simpson, 189 F.3d 284, 286-87 (2d Cir. 1999) (internal quotation marks and citation omitted). The court must accept all well-pled factual allegations in the complaint as true and draw all reasonable inferences

in favor of the plaintiff. See Koppel v. 4987 Corp., 167 F.3d 125, 130 (2d Cir. 1999). The primary inquiry is not whether the plaintiff will ultimately prevail, but whether the plaintiff's allegations are sufficient to permit him to support his claims with evidence. See Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995). It should also be noted that courts are particularly hesitant to dismiss actions filed by pro se litigants, as pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). "When considering motions to dismiss a pro se complaint such as this, 'courts must construe [the complaint] broadly, and interpret [it] to raise the strongest arguments that [it] suggest[s].'" Weixel v. N.Y.C. Bd. of Educ., 287 F.3d 138, 145-6 (2d Cir. 2002) (quoting Cruz v. Gomez, 202 F.3d 593, 597 (2d Cir. 2000)). As a general rule, an action brought pro se "should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hughes v. Rowe, 449 U.S. 5, 10 (1980). "Nevertheless, the [c]ourt is also aware that pro se status does not exempt a party from compliance with relevant rules of procedural and substantive law." Iwachiw v. N.Y.C. Bd. of Educ., 194 F. Supp. 2d 194, 202 (E.D.N.Y. 2002) (citing Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983)).

B. ROOKER-FELDMAN DOCTRINE

Defendants argue that plaintiffs claims are barred by the Rooker-Feldman doctrine. (Def. Mem. 14-17.) For the reasons that follow, the court concludes that some, but not all of plaintiff's claims are so barred.

Based on the general principle "that within the federal judicial system, only the Supreme Court may review state-court decisions," the Rooker-Feldman doctrine holds that "federal district courts lack jurisdiction over suits that are, in substance, appeals from state-court judgments." Hoblock v. Albany County Bd. of Elections, 422 F.3d 77, 85, 84 (2d Cir. 2005).

In the eponymous Feldman case, the Supreme Court held that the doctrine barred district court review of "claims that a state court has unlawfully denied a particular applicant admission" to the state bar, since such particular applications are judicial proceedings in nature and effect, whereas district courts have jurisdiction to review "general challenges to state bar admission rules," since state "courts may act in a non-judicial capacity in promulgating rules regulating the bar." District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86 (1983).

The Supreme Court has recently clarified the narrow scope of the doctrine. See Lance v. Dennis, 126 S. Ct. 1198, 1201 (2006) (per curiam) ("[O]ur cases since Feldman have tended to emphasize the narrowness of the Rooker-Feldman rule."); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283, 291 (2005) (noting that lower courts have extended the doctrine "far beyond the contours of the Rooker and Feldman cases," and explaining "the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes" subject-matter jurisdiction in the district court); Hoblock, 422 F.3d at 85 ("In Exxon Mobil, the Supreme Court pared back the Rooker-Feldman doctrine to its core . . . ."). While

reining in lower courts' extension of the doctrine, the Exxon Mobil Court left Feldman's holding in tact. See 544 U.S. at 283-87, 291-92.

In Hoblock, the Second Circuit examined Exxon Mobil and identified "four requirements for the application of Rooker-Feldman": (1) "the federal-court plaintiff must have lost in state court"; (2) "the plaintiff must complain of injuries caused by a state-court judgment"; (3) "the plaintiff must invite district court review and rejection of that judgment"; (4) "the state-court judgment must have been rendered before the district court proceedings commenced–i.e., Rooker-Feldman has no application to federal-court suits proceeding in parallel with ongoing state-court litigation." 422 F.3d at 85 (internal quotation marks omitted).

In this case, several of plaintiff's claims satisfy these four requirements and are therefore dismissed for lack of subject matter jurisdiction. Plaintiff's second, third, and, to some extent, fifth claims for relief meet the requirements of even this "pared back" Rooker-Feldman doctrine. Plaintiff's second claim alleges that defendants' failure to give reasons for rejecting plaintiff's application for reinstatement to practice law violates the Due Process Clause. (Compl. ¶¶ 33-35, B.) By this claim, plaintiff seeks to have this court review the Appellate Division's Decision and Order dated November 25, 2003, whereby that court denied plaintiff's motion seeking reinstatement. (Pl. Aff. Ex. E.) Plaintiff was the losing party in state court. He complains of injury from the state-court judgment, asserting that the state court's failure to specify its reasons violates his due process rights. He asks this court to review and reject the state-court

order. And the state-court order was rendered in November 2003, prior to the filing of this action. This claim is therefore barred by the Rooker-Feldman doctrine.

Similarly, plaintiff's third claim alleges that defendants set conditions upon plaintiff's reinstatement in violation of the Due Process and Equal Protection Clauses and the Ex Post Facto Clause. (Compl. ¶¶ 36-38, C.) It is not clear from plaintiff's complaint what requirements he alleges to be ex post facto conditions imposed on his reinstatement by defendants. But to the extent that plaintiff is complaining of the Appellate Division's specific application of the disciplinary rules in his particular case and asking this court to review and reject either the Appellate Division's denial of reinstatement in 2003 or its orders of 1990 or 1994 suspending plaintiff, that challenge is barred by Rooker-Feldman.

Plaintiff's fifth claim, to the extent it seeks review of defendants' application of the disciplinary rules to his particular case by alleging that defendants subjected plaintiff to ex post facto conditions different from those conditions "that are accorded to Caucasians," (Compl. ¶ 47), is barred for the same reasons. It is not clear from plaintiff's complaint how the Appellate Division's punishment of him differed from its application of the disciplinary rules "to Caucasian attorneys." But it is clear that Rooker-Feldman precludes plaintiff from asking this court to review and reject the state-court orders suspending him and denying him reinstatement.

As this discussion suggests, however, several of plaintiff's claims are not barred by Rooker-Feldman. As in Feldman, to the extent that plaintiff makes a general challenge to the constitutionality of the Appellate Division's disciplinary rules, his claims are not barred by the Rooker-Feldman doctrine because they "do not require review of a judicial decision in a particular case." Feldman, 460 U.S. at 482-87. Plaintiff's first and fourth claims raise general challenges to the Appellate Division's disciplinary procedures, alleging that the absence from those procedures of mechanisms to re-open disciplinary orders and to enable compulsory process and discovery violates the Due Process and Equal Protection Clauses. These claims, as well as plaintiff's general challenge that the disciplinary procedures violate the Equal Protection Clause by subjecting African-American attorneys to different conditions than those applied "to Caucasian attorneys," are therefore not barred by Rooker-Feldman.[3] See Mosby v. Ligon, 418 F.3d 927 (8th Cir. 2005) (holding that Rooker-Feldman bars disciplined attorney's claims challenging particular application of the disciplinary

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[3] The court notes that the Second Circuit addressed Rooker-Feldman's application to similar claims raised by a doctor disciplined by New York's Board for Professional Medical Conduct. See Hachamovitch v. DeBuono, 159 F.3d 687 (2d Cir. 1998). In Hachamovitch, the court applied this circuit's overly expansive Rooker-Feldman principles to bar a doctor's claim that he was entitled to exculpatory evidence, while permitting review of the doctor's claim that the disciplinary proceedings are constitutionally defective due to "the absence of any mechanism for the reopening of a closed disciplinary proceeding in light of newly discovered evidence." 159 F.3d at 694-96.

procedures of the Arkansas bar but does not bar attorney's facial challenges to the rules).

C. STANDING

Although the parties have not addressed the issue of standing, the court raises it sua sponte because it "goes to this [c]ourt's subject matter jurisdiction." Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005); Henneberry v. Sumitomo Corp. of America, 415 F. Supp. 2d 423, 438 (S.D.N.Y. 2006) ("Regardless whether the parties raise standing on their own, the Court may address the issue at any time, sua sponte.").

Before addressing the issue of standing, however, the court disposes of any argument that standing doctrine would not apply here. In light of the similarities between plaintiffs' remaining claims and those raised in Feldman, where the Supreme Court stated that the district court in that case "has subject matter jurisdiction over [the general constitutional challenges] of [Feldman's] complaint[]," 460 US. at 487, it may seem odd to suggest that this court lacks subject matter jurisdiction in this case. Nevertheless, the Supreme Court has cautioned that "[w]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974); see also Adeleke v. U.S., 355 F.3d 144, 149-50 (2d Cir. 2004); Mosby v. Ligon, 418 F.3d 927, 932-33 & n.2 (8th Cir. 2005) ("But Feldman does not relieve Mosby of the requirement that she demonstrate Article III standing, and we conclude

that Mosby does not have standing to bring what she describes as her facial challenge."); Grendell v. Ohio Supreme Court, 252 F.3d 828, 835-37 (6th Cir. 2001) ("[T]he Supreme Court's determination in Feldman concerning a federal district court's subject matter jurisdiction over a general constitutional challenge, made without comment as to the standing of the litigants, cannot be construed as implying that all general constitutional challenges made in recognition of the Rooker-Feldman doctrine confer standing on those litigants."). In addition, courts in this Circuit have applied the ordinary standing requirements after dismissing some of plaintiff's claims on the basis of Rooker-Feldman. See, e.g., International Fidelity Insurance Co. v. City of New York, 263 F. Supp. 2d 619, 629-35 (E.D.N.Y. 2003) (holding that Rooker-Feldman bars several claims and lack of standing bars remaining claims).[4]

These decisions firmly establish that although plaintiff has successfully avoided the dismissal of his entire complaint on the basis of Rooker-Feldman, plaintiff, as the party invoking this court's jurisdiction, nonetheless "bears the burden of establishing the elements of standing." Lujan v. Defenders of Wildlife, 504 US. 555, 561 (1992).

Under Article III, § 2 of the Constitution, plaintiff must show that: "(1) [he] has suffered an injury in fact

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[4] The court further notes an unpublished summary order in which the Second Circuit side-stepped the difficult question of dismissal on the basis of Rooker-Feldman by holding that plaintiff "lacks standing to pursue the declaratory relief demanded." Rosenberger v. New York State Office of Temporary and Disability Assistance, 153 Fed. Appx. 753, 754-55 (2d Cir. 2005).

that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant[s]; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Hakim v. Chertoff, 447 F. Supp. 2d 325, 327-28 (S.D.N.Y. 2006) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000)). "A plaintiff must demonstrate standing for each claim and form of relief sought." Vaughn v. Consumer Home Mortgage Co., No. 01 Civ. 7937, 2006 WL 2239324, at *5 (E.D.N.Y. Aug. 4, 2006) (internal quotation omitted).

Most significantly for this case, "[a] plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." Deshawn E. by Charlotte E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) (citing City of Los Angeles v. Lyons, 461 U.S. 95, 105-06 (1983)). In addition, "abstract injury is not enough; rather, the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." Shain v. Ellison, 356 F.3d 211, 215 (2d Cir. 2004) (internal quotations omitted).

Aside from plaintiff's First Amendment retaliation claim, discussed below, plaintiff's remaining claims raise general challenges to the Appellate Division's disciplinary rules. Plaintiff argues that the procedures are constitutionally deficient because: (1) they lack a mechanism whereby a disciplined attorney may re-open and vacate the punishment on the basis of newly-discovered evidence or the misconduct of an adverse party; (2) they lack a mechanism for attorneys in disciplinary proceedings to obtain compulsory

process and discovery;[5] and (3) the conditions for reinstatement for African-American attorneys differ from those applied "to Caucasian attorneys."

The court concludes that plaintiff lacks standing to raise these claims because the record here does not demonstrate that he is likely to suffer from any of these alleged constitutional deficiencies in the future. Undoubtedly, plaintiff has been injured by his past encounters with the Appellate Division's disciplinary procedures. In 1988, plaintiff was reprimanded "for his disrespectful and obstreperous conduct as a defense attorney on July 11, 1984, when he threw his briefcase in the direction of the Judge's bench, striking the bench." In re Alton H. Maddox, 201 A.D.2d 24, 29, 615 N.Y.S.2d 439, 441 (App. Div. 2d Dep't 1994) (per curiam). In 1990, plaintiff was suspended. See In re Alton H. Maddox, 157 A.D.2d 244, 555 N.Y.S.2d 851 (App. Div. 2d Dep't 1990) (per curiam). In 1994, plaintiff was again suspended. 201 A.D.2d 24,615 N.Y.S.2d 439. And in 2006, according to plaintiff, he was admonished. (Pl. Opp'n Mem, 11.)

Although these past punishments can be "evidence bearing on whether there is a real and immediate threat of repeated injury," City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (internal quotation omitted), they do not serve to establish the existence of

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[5] The court notes that plaintiff's claim that the Second Department Appellate Division must provide for discovery similar to that provided by the First Department Appellate Division under 22 N.Y.C.R.R. § 605.17 may now be moot. Pursuant to the recommendations of the Krausman Report, (Pl. Aff. Ex. D at 14, 25), the Second Department has adopted a rule similar to the First Department's rule. See 22 N.Y.C.R.R. § 691.5-A.

such a threat. Plaintiff must demonstrate that he faces a concrete and particularized, non-speculative, imminent future harm. For plaintiff to satisfy his burden of establishing a sufficient likelihood of injury by a future unconstitutional disciplinary procedure, he would have to show that if he engages in professional misconduct and if he is investigated by the Grievance Committee and if he is disciplined and if he obtains newly-discovered evidence which "would probably have produced a different result" or evidence of misconduct by an adverse party, see N.Y. C.P.L.R. § 5015, he will be denied an opportunity to present that evidence or he will be denied a means to obtain necessary evidence by compulsory process or discovery or he will be subjected to different disciplinary conditions because of his race. As the Second Circuit stated in Shain, "[s]uch an accumulation of inferences is simply too speculative and conjectural to supply a predicate for prospective [equitable] relief." Shain, 356 F.3d at 216.

Furthermore, this conclusion comports with opinions in other circuits holding that disciplined attorneys lack standing to raise general challenges to state disciplinary rules. In Mosby v. Ligon, the Eighth Circuit dismissed for lack of standing a punished attorney's facial challenge to the Arkansas Model Rules of Professional Conduct. 418 F.3d 927 (8th Cir. 2005). The plaintiff in that case, Lori Mosby, alleged that the director of the Arkansas Supreme Court Committee on Professional Conduct had acted and was likely to act in bad faith and with deliberate indifference toward Mosby's rights, that he was likely to apply the rules to her in a manner that violated the Equal Protection and Due Process Clauses, and that the Supreme Court's Justices discriminatorily applied the rules and acted with deliberate indifference toward

such discrimination. 418 F.3d at 929-30. The Eighth Circuit held that Mosby lacked standing to raise such general challenges, stating:

> We deem apropos the Supreme Court's observation in O'Shea [v. Littleton], that "attempting to anticipate whether and when respondents will be charged with crime . . . takes us into the area of speculation and conjecture," 414 U.S. at 497, because we have the same inability to foresee whether Mosby will face future disciplinary proceedings. The speculative nature of making this prediction leads us to conclude that the record does not establish a real or immediate threat of repeated injury. Mosby thus lacks standing to pursue the injunctive relief that she seeks.

418 F.3d at 933-34.

Similarly, in Grendell v. Ohio Supreme Court, the Sixth Circuit held that attorneys sanctioned pursuant to Ohio Rule of Civil Procedure 11 lacked standing to argue that the sanctions rules facially violate the Due Process Clause by failing to afford notice and the opportunity to be heard. 252 F.3d 828 (6th Cir. 2001). The Sixth Circuit explained that in order

> to show a palpable threat of future injury necessary to achieve standing for declaratory and injunctive relief, Grendell must present evidence establishing: (1) that he is bringing or highly likely to bring a lawsuit before the Ohio Supreme Court; (2) that such lawsuit is allegedly frivolous, exposing him to sanctions under Rule XIV, § 5; (3) that the Ohio Supreme

> Court would, in its discretion, impose such sanctions; and (4) that the imposition of those sanctions would violate due process. Such a chain of events is simply too attenuated to establish injury in fact, and to confer the required standing in this case.

252 F.3d at 833.

Although in light of plaintiff's pro se status the court would ordinarily afford plaintiff an opportunity to amend his complaint to establish standing, in this case the court concludes that it is beyond a doubt that plaintiff cannot put forth the facts necessary to establish standing. For these reasons, the court concludes that plaintiffs claims raising general challenges to the Appellate Division's disciplinary rules and procedures are dismissed for lack of subject matter jurisdiction.[6]

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[6] The court further notes an additional basis for concluding that plaintiff lacks standing to challenge the disciplinary procedure's absence of a mechanism for re-opening a suspension. Even if plaintiff is correct in arguing that the Constitution requires that the state provide to disciplined attorneys a mechanism to re-open their punishments similar to that provided to civil litigants by N.Y.C.P.L.R. § 5015 and to criminal defendants by N.Y. Crim. Proc. § 440.10, plaintiff's alleged basis for re-opening his suspension appears to be meritless. Under C.P.L.R. § 5015(a)(2), relief from a judgment may be had if newly-discovered evidence "would probably have produced a different result." Similarly, under Crim. Proc. Law § 440.10(1)(g), the standard for vacating a judgment requires that new evidence "create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." The newly-discovered evidence identified in plaintiff's complaint consists of an affidavit from a grand juror empanelled

D. FIRST AMENDMENT RETALIATION

Defendants argue that plaintiff's First Amendment claim is not ripe for review because plaintiff has not been "punished, or even threatened with punishment for his admitted comments." (Def. Mem. 19-21.) Defendants contend that the "Grievance Committee has merely begun an investigation into Plaintiff's statements." (Def. Reply Mem. 9-11.) Defendants concede that "[i]f the Grievance Committee ultimately attempts to discipline Plaintiff for his speech, Plaintiff is free to" advance his free speech claims in state court. (Def. Reply Mem. 10.)

Defendants fail to acknowledge, however, that plaintiff has indicated in his brief that the Grievance Committee, by letter dated June 29, 2006, "informed plaintiff that it had issued an admonition," (Pl. Mem. 11), which is defined as "discipline without a hearing." See 22 N.Y.C.R.R. § 691.6. Because this admonition occurred after plaintiff served his amended and supplemental complaint on May 1, 2006, the complaint obviously omits it.

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to investigate the charges made by Ms. Brawley and relates to the grand jury report in that investigation. (See Pl. Aff. ¶ 5; Pl. Aff. Ex. C.) Plaintiff's suspensions, however, were based not on the initial charges of misconduct relating to plaintiff's representation of Ms. Brawley, but rather on his refusal to cooperate with the Grievance Committee's investigations and his failure to file an affidavit demonstrating compliance with his suspension. The affidavit, therefore, has no bearing whatsoever on the conclusion that plaintiff violated the rules for which he was suspended. Plaintiff is neither injured by the absence of the procedure he desires nor would any injury be redressed by a favorable decision in this court.

Plaintiff is therefore permitted to amend his complaint to include this subsequent allegation of retaliation. Without evaluating plaintiff's claim at this time, the court notes that the Grievance Committee may be the more appropriate defendant. In re-pleading, plaintiff should also be careful to set forth, if possible, the elements of a First Amendment retaliation claim required by Second Circuit precedents regarding criticism of public officials by private citizens. See. e.g., Gill v. Pidlypchak, 389 F.3d 379 (2d Cir. 2004) (discussing various formulations of the elements of First Amendment retaliation claims but opting not to "choose among these various possibilities to decide the case before us today").

CONCLUSION

For the reasons discussed above, the court grants defendants' motion for dismissal in part, denies defendants' motion in part, and grants plaintiff permission to re-plead his First Amendment retaliation claim. Specifically, under the Rooker-Feldman doctrine, the court lacks subject matter jurisdiction to entertain plaintiff's challenges to the particular application of the disciplinary rules in the state judicial proceedings against him. To the extent plaintiff's complaint raises facial challenges to the disciplinary rules and procedures, the court lacks subject matter jurisdiction because plaintiff lacks standing to bring such challenges. Finally, the court grants plaintiff permission to re-plead his First Amendment retaliation claim within twenty days of the date of this order.

SO ORDERED.

/s/_____
Allyne R. Ross
United States District Judge

Dated: December 14, 2006
Brooklyn, New York

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cc: Magistrate Judge Bloom

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

07-0187-cv

[Filed January 26, 2009]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of January, two thousand and nine.

Before: Hon. Dennis Jacobs,
Hon. Reena Raggi,
Hon. Debra Ann Livingston,
Circuit Judges.

Alton H. Maddox Jr.,
Plaintiff-Appellant,
v.

A. Gail Prudenti, David S. Ritter, Myriam J. Altman, Nancy E. Smith, Fred T. Santucci, Anita R. Floria, Howard Miller, Stephen G. Crane, Thomas A. Adams, Daniel F. Luciano, Gabriela M. Krausman, Sondra Miller, Gloria Goldstein, Robert W. Schmidt, Steven W. Fisher, Robert A. Spolzino, William F. Mastro, Barry Cozier, Peter B. Skelos, Robert A. Lifson, as Associate Justices of the Appellate Division,

Second Judicial Department,)
Defendants-Appellees.)

Alton H. Maddox, Jr., having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By:_____
Frank Perez, Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

07-0187-cv

[Filed May 5, 2009]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of May, two thousand and nine,

Before: Hon. Dennis Jacobs,
Chief Judge,
Hon. Reena Raggi,
Hon. Debra Ann Livingston,
Circuit Judges.

Alton H. Maddox Jr.,
Plaintiff-Appellant,
v.

A. Gail Prudenti, David S. Ritter, Myriam J. Altman, Nancy E. Smith, Fred T. Santucci, Anita R. Floria, Howard Miller, Stephen G. Crane, Thomas A. Adams, Daniel F. Luciano, Gabriela M. Krausman, Sondra Miller, Gloria Goldstein, Robert W. Schmidt, Steven W. Fisher, Robert A. Spolzino, William F. Mastro, Barry Cozier, Peter B. Skelos, Robert A. Lifson, as Associate

Justices of the Appellate Division,)
Second Judicial Department,)
Defendants-Appellees.)

IT IS HEREBY ORDERED that the motion by *pro se* Appellant Maddox to publish the summary order dated December 23, 2008 is DENIED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By:_____
Judy Pisnanont
Motions Staff Attorney